

The Arkansas Register



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TABLE OF CONTENTS

ATTORNEY GENERAL

Opinions 4

RULES AND REGULATIONS 11

INSURANCE DEPARTMENT

Orders 13

LEGISLATIVE AUDIT

Orders 14

Charlie Daniels
Secretary of State
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THE ARKANSAS REGISTER

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ATTORNEY GENERAL OPINIONS

Opinion No.:2004-313

Matayo, Doug
State Representative

RE: If school district bonds, to which ad valorem millage has been pledged pursuant to a vote, are retired after January 1, 2001, will such millage cease to be protected under Ark. Const. amend. 78 and thereby become available to be pledged to redevelopment district debt? Q2) Does the answer to q1 depend on any of the following three variables relating to the source of the money used to retire the bonds?: a) the bonds are retired from excess tax collections or from any other source except refunding bond proceeds; b) the bonds are retired from the proceeds of refunding bonds issued by the school district and voted; and c) the bonds are retired from the proceeds of refunding bonds issued by the school district and not voted. Q3) If the millage pledged to outstanding school district bonds pursuant to a vote is reduced by rollback or otherwise after January 1, 2001, will the excess millage which has been pledged cease to be protected by Ark. Const. amend. 78 and thereby become available to be pledge to redevelopment district debt? **RESPONSE:** Decline to answer because of impending litigation. However, I will note generally that a millage that has fulfilled its purpose of retiring debt will lapse in the year the debt is retired, thus apparently mooting at least certain of your questions. Of course, the voters may, and in practice frequently do, dedicate the lapsed millage to some other purpose.

Opinion No.:2004-334

Schulte, Susan
State Representative

RE: Is Cabot City Ordinance No. 25, (stating that variances and waivers decided by the Board of Adjustment and the Planning Commission under the city's zoning ordinance and subdivision regulation must then be presented to the Cabot City Council for modification, approval or rejection), legal since the statutes and the Cabot Board of Adjustment

regulations place any appeals before a court of record? Q2) Does Cabot Ord. 25 supersede the other rules and statutes? **ANSWER:** Q1) The Ordinance is likely subject to challenge to the extent it provides for the City Council to take action on matters that have been assigned by the zoning statute (A.C.A. 14-56-416) to the Board of Adjustment. See also 14-56-425. I believe the City Council may, however, lawfully establish procedures for its review of the Planning Commission's action in administering the City's subdivision regulations. See opinion for analysis. Q2) This may require construing the ordinance to determine local intent, an undertaking for local counsel and not this office. Clearly, however, a statute generally prevails over any conflicting local ordinance.

Opinion No.:2004-338

Jeffress, Gene
State Senator

RE: May state-oriented educational cooperatives operate state-funded preschools? Q2) Under what circumstances would a developmentally delayed school (DDS) be allowed to extend its focus or its original boundaries? **ANSWER:** Q1) Generally, yes. This has reference to the Arkansas Better Chance Program Act, as amended (A.C.A. 6-45-101 et seq. and Act 49 of the 2003 second special (extraordinary) session, the "ABC Program;" see A.C.A. 6-45-105, 6-45-106), and the Arkansas Better Chance for School Success Program for three and four-year-olds. See 6-45-105 and 6-45-108 (amended by Acts 2003, 2nd Ex. Sess., No. 49). See also 6-13-1002 and 6-13-1026 regarding programs and services of an education service cooperative.

Opinion No.:2004-340

Goss, Kevin
State Representative

RE: Is the City of Blytheville liable or authorized to pay for a rental vehicle for a resident whose car was damaged by a vehicle engaged in a chase with the

ATTORNEY GENERAL OPINIONS

Blytheville police? **RESPONSE:** Municipal corporations are immune from liability and suit for damages, except to the extent that they may be covered by liability insurance. ACA 21-9-301 and 21-9-303. Cities have authority to hear and settle tort claims against them. ACA 21-9-302. Ultimately, the decision to appropriate money to pay a potential tort claim will depend upon all the surrounding facts and is a decision vested in city officials. See opinion for full analysis.

Opinion No.:2004-341

Rankin, Randy
State Representative

RE:Is it legal for a church to display campaign signs on church property? **RESPONSE:** In my opinion, there does not appear to be any state law that would restrict the action you describe, but I recommend contacting the Federal Internal Revenue Service, Tax-Exempt and Governmental Entities Division at 1-877-829-5500 concerning potential federal repercussions.

Opinion No.:2004-343

Dangeau, Leroy & Capps,
State Representative & Senator

RE:Does the fact that the Federal Environmental Protection Agency does not have a requirement that waste tires be baled and they cannot be monofilled, exempt the Department of Environmental Quality from complying with Act 1264 of 1993, which requires an economic impact/environment benefit analysis? **RESPONSE:** In my opinion, in the absence of federal requirements on the subject, the proposed amendment to Reg. 14.704 is not more stringent than the federal requirements under ADEQ Reg. 8, Sec. 3.5.3, and therefore does not require a cost-benefit analysis under A.C.A. 8-1-203 (b)(1)(B) (Repl. 2000). It might be argued, however, that the interpretation offered in Reg.

8, Sec. 3.5.3 cuts against the legislative intent of ACA 8-1-203.

Opinion No.:2004-344

Glover, Bobby L.
State Senator

RE:Can a mayor and city council be held liable if the city fire department is called outside the city limits to fight a fire and is therefore unable to respond properly to a fire that occurs within the city limits during that time? Q2) Is the City of England properly covered by liability insurance if a fireman is injured or causes injury to another person while fighting fires outside the city limits of England? Q3) Is the governing body of the City of England and the Mayor given tort immunity or covered under the Good Samaritan Law of Arkansas if actions taken by the England Fire Department cause injury, loss of life or property outside the city limits of England? Q4) What are the functions of Act 833 regarding assistance to the fire department within the five-mile radius of England? **RESPONSE** 1) See 14-53-102; 2) the answer would require reference to the insurance policy or program, but see 14-53-102c (2); 3) See again 14-53-102; 4) Does not seek a legal conclusion, must refer question to legislative officials, city attorney or officials charged with administering the law.

Opinion No.:2004-345

Madison, Sue
State Senator

RE:Can a millage tax levied for the purpose of maintaining and operating a public city library pursuant to Amendment 30, be collected and deposited in a tax increment financed (TIF) redevelopment fund? Q2) Does a TIF's total ad valorem rate exclude, by definition, "specified," i.e., special-use taxes? **RESPONSE:** Decline to answer because of impending litigation.

ATTORNEY GENERAL OPINIONS

Opinion No.:2004-350

Hardwick, Horace A.
State Representative

RE:Will the one mill pledged by the NorthWest Arkansas Community College District for debt service increase the ad valorem taxes in the City of Rogers' Tax Increment Financing (TIF) District? **RESPONSE:** Decline to answer because of impending litigation.

Opinion No.:2004-351

Key, Johnny
State Representative

RE:Is the Mountain Home Fire Protection District, which covers a rural, unincorporated area, entitled to receive Act 833 funds (fire insurance premium tax funds)? Q2) If the answer to Q1 is "yes," can the City of Mountain Home receive the Act 833 funds directly or, in the alternative, can the Mountain Home Fire Protection District receive the funds and turn them over to the City? **ANSWER:** No fire protection entity is "entitled" to Act 833 funds because the act provides for the distribution of these funds at the local level, according to the discretion of local authorities. See A.C.A. 14-284-403. I am not in a position to question that distribution. The remaining questions are moot in light of this response.

Opinion No.:2004-352

Salmon, Mary Anne
State Senator

RE:Did Legislative Audit correctly interpret Act 1738 of 2002 (A.C.A. 6-13-620(b), which sunset on June 30, 2004), when it cited a charter school for spending an \$85,000 private grant on a wireless computer network project without getting the state board of education's prior written approval? **ANSWER:** Yes. It is clear from the plain language of the statute that

the legislature intended for the \$75,000 restriction to apply to "any contractual or project obligation" of a charter school or an educational cooperative during the specified time period (July 16, 2003 through July 1, 2004). The preapproval requirement was thus applicable, regardless of the source of funds for the contract or project.

Opinion No.:2004-357

Hutchinson, Jeremy
State Representative

RE:Do the Arkansas anti-gambling statutes or the anti-lottery provision of the Arkansas Constitution prohibit the activities of the amateur poker league (described in the request), including hosting a poker tournament in which participants do not pay to participate and are prohibited from wagering, but have the ability to win a prize? Q2) Is the answer to q1 different if the league does not award prizes or if the value of the prize is less than a certain dollar amount? Q3) Are the answer to Q 1 & 2 different if the game being played by participants is something other than poker, such as Monopoly or Yahtzee? **RESPONSE:** In my opinion, the activity of the league as described above would likely be found by a court to be neither a lottery as prohibited by the Arkansas Constitution nor illegal gambling prohibited under A.C.A. 5-66-101 through -119 (Repl. 1997). Based on existing Arkansas law, it appears that such poker leagues may legally run tournaments of poker where the participants are able to win prizes so long as the prizes are not directly or indirectly paid for by the players, by means such as entrance fees to the tournament or membership fees to the league or otherwise. This same analysis would also apply to other games in addition to poker, such as bingo, blackjack, and so forth so long as the players do not make any direct or indirect payment for a chance to win. As noted below, only a court could fully analyze any particular set of facts to determine legality. And, of course, the enforcement of the laws against gambling fall within the authority of local prosecutors and enforcement of the regulations on establishments serving alcoholic beverages fall under the jurisdiction of the Arkansas Alcohol Beverage

ATTORNEY GENERAL OPINIONS

Control Board in the first instance. Anyone proposing to participate in such a game would be well-advised to contact the local prosecuting attorney and the Alcohol Beverage Control Board. In response to question 2, I direct you to my response to question 1. In response to question 3, I opine that the answer would be the same as the answers to Question 1 and Question 2.

Opinion No.:2005-009

Petrus, Benny
State Representative

RE:Would it be considered a conflict of interest under the Ethics law (Act 1599 of 2001) for the spouse of a school teacher to submit a bid (for insurance services) to the Board of Education? **RESPONSE:** In my opinion, it is a question of fact whether Act 1599 of 2001 or the applicable Department of Education regulations would prohibit the spouse of a school teacher from submitting a bid to the Board of Education in the situation you have described. I am not empowered as a fact finder in issuance of Attorney General Opinions. In any event, jurisdiction to review alleged violations of the Act is invested with the Department of Education, not this office. See A.C.A. 6-24-114 (Supp. 2003).

Opinion No.:2005-015

Nichols, Wayne
State Representative

RE:What is the definition of the term "salvage yard"? **ANSWER:** This depends upon the specific context, as there is no generally applicable definition under state law. The Arkansas Litter Control Act defines a salvage yard as "any business that, in the course of its operation, maintains ten (10) or more vehicles to be used, wholly or in parts, to generate revenue for the operations of the business[.]" A.C.A. § 8-6-403 (13). There is no other statutory definition of "salvage yard." It is possible that the term has been defined

by local regulation. I lack sufficient information, however, to identify any other potentially applicable definition.

Opinion No.:2005-019

Madison, Sue
State Senator

RE:Can a school district allow summer training institutes to substitute for some or all of the five additional professional development days required by Act 102 of the 2003 Special Session? Q2) If school districts are allowed to make a substitution of the professional development days with attendance at summer institutes, are additional days of professional development required over and above those required by Act 102 of the 2003 Special Session and are the days paid for in accordance with ACA 6-17-807? **RESPONSE:** Q1) No. Nothing in the Code or applicable regulations supports the conclusion that specialized pre-AP and AP training may be credited against the general professional development training required of all teachers. Q2) Moot in light of my response to Question 1.

Opinion No.:2005-020

Holt, Jim
State Senator

RE:What "state and local public benefits that are not federally mandated" in the State of Arkansas would be affected by SB 206? Q2) Would SB 206 affect only benefits found in Title 20 of the Arkansas Code? Q3) If the answer to Q2 is "no," then what benefits outside of Title 20 would be affected by SB 206? Q3) Would SB 206 affect emergency medical treatment, including prenatal care, which is currently covered by the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA), 42 U.S.C. 1395dd? **ANSWER:** I am unable to definitively opine in response to these questions, each of which essentially requires that I attempt to interpret the phrase "state and local public

ATTORNEY GENERAL OPINIONS

benefits that are not federally mandated” which your bill does not define. As an executive branch official, I cannot supply a definition. If it is your intent to simply implement the federal eligibility requirements with respect to those benefits found in Title 20 that fall within the federal definition of “state and local public benefits” (see 8 U.S.C. sec. 1621), I believe you would be well-advised to clarify the bill to so state. Otherwise, I believe questions will remain regarding the substantive effect of this bill.

Opinion No.:2005-028

Broadway, Shane
State Senator

RE:Where a request is made for a document, or a family of documents which are required by statute or regulation to exist, and such documents do not exist, does the record custodian have to respond to the request (stating such non-existence) or can the FOIA request simply go unanswered on a rationale that since there are no such documents, there is no requirement in the FOIA to reveal that non-existence? **RESPONSE:** Because a response to your question would necessarily involve my interpretation of currently-effective statutory language that is the subject of ongoing litigation, I must decline to respond. This office has a long-standing policy against the issuance of opinions on matters that are the subject of pending litigation. The case to which I refer is *Gerald L. Brumley v. Larry Williams*, Individually and in his capacity as Garland County Judge, Garland County Circuit Court, Case No. CV 2004-1352-III. This case addresses the same issue that you have presented in your request for an opinion. For this reason, it would be inappropriate for me to respond.

Opinion No.:2005-030

Burke, Brian T.
Att’y, Bentonville A & P Commission

RE:Is the decision of the custodian of records to withhold release of an ad hoc committee’s

memorandum created after the initial suspension of an A&P employee but before his resignation consistent with provisions of the Freedom of Information Act (FOIA)? Requestor also poses three additional questions regarding compliance with the FOIA. **RESPONSE:** Based upon the facts presented, in my opinion the decision to withhold the memorandum is generally consistent with the FOIA. The memorandum, because it post-dates the suspension, could not have “formed a basis” for the decision to suspend the employee. In addition, because the employee resigned, there is no indication that it formed the basis for a decision to terminate the employee. Resignation is not a triggering event for the release of job performance records.

Opinion No.:2005-032

Thompson, Lisa
The Morning News

RE:Is the decision of the custodian of records for the City of Lowell to withhold release of the personnel file of a former employee, and the transcript of a tape-recording of telephone conversations between two employees consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** I cannot answer with regard to the personnel file without more facts. However, the opinion reviews the applicable tests. The release of the transcript will depend on its contents and the balance between the public’s interest in it and any privacy interest therein.

Opinion No.:2005-033

Baker, Gilbert
State Senator

RE:Would a law establishing the petition requirement for a “liquor-by-the-drink” election in a dry county at 20% of the voters in the last gubernatorial election in any way jeopardize or create binding legal precedent that would jeopardize the current 38% of the registered electorate petition standard for a wet/dry election? **ANSWER:** I lack sufficient information to satisfactorily

ATTORNEY GENERAL OPINIONS

respond to this question. This pertains to “on-premises consumption” of alcoholic beverages. See A.C.A. 3-9-206. Currently, such an election is held only in cities and counties in which the sale of alcoholic beverages is not prohibited by law. See A.C.A. 3-9-201(f), 3-9-203 and 3-9-207.

Opinion No.:2005-034

Oliver, Steve

Pros Att’y, 18th Judicial District

RE:Is the scenario for a “Texas Hold ‘em Poker Tournament,” as proposed in this opinion request, considered gambling since there are no cash or prizes given? Q2) Is there any case law or Attorney General’s opinion addressing the issue of whether or not “Texas Hold ‘em,” or similar poker games, are a game of skill? Q3) If the sponsor of this tournament can demonstrate that the game of “Texas Hold ‘em” is one of skill and judgment rather than chance and chance alone, would the described activities violate any criminal statute? **RESPONSE:** In my opinion, the participants in these tournaments are wagering consideration by paying the entrance fee with the promise of prizes for an ultimate winner. With regard to Question 1, I believe that this scenario would be considered gambling and prohibited by A.C.A. 5-66-112. I cannot opine, however, on whether the constitutional prohibition of lotteries would apply because the question of whether the game is a game of chance and chance alone is a question of fact suited for the judiciary. See e.g. Op. Att’y Gen. 2004-357. With regard to Question 2, I have not found any Arkansas cases or Attorney General’s opinions that address this matter. As I recently noted, this is a question of fact that I am neither equipped nor authorized to answer. Id. With regard to Question 3, A.C.A. 5-66-112 prohibits the wagering of money or anything of value on a game of cards and would be violated by the scenario described even if Mr. Hickman could prove that the game was not a game of chance and chance alone.

Opinion No.:2005-046

Pyle, Beverly

State Representative

RE:Is it legal for cities to give monies to Boys and Girls Clubs? **RESPONSE:** No. See Ark. Op. Att’y Gen. No. 2001-135.

Opinion No.: 2005-054

Holt, Jim

State Senator

RE:Does House Bill 1525, which would make certain students without documented immigration status eligible for in-state college tuition and state supported scholarships, violate any applicable federal law? **RESPONSE:** Although we do not have the benefit of a judicial interpretation, in my opinion, HB 1525, as written, may violate 8 U.S.C. sec. 1623 if the courts read the high school attendance and graduation requirements as being tantamount to residence. The bill may also give rise to an equal protection challenge. See opinion for full analyses.

Opinion No.:2005-057

Kerr, Tracie, et al.

9-1-1 Communications Employees

RE:Is the decision of the custodian of records to release the names, departments, salaries, amounts paid in overtime and total number of overtime hours worked for all city employees during the years 2003 and 2004, in response to a Freedom of Information (FOIA) request from the Arkansas Democrat Gazette consistent with provisions of the FOIA? **RESPONSE:** Yes.

ATTORNEY GENERAL OPINIONS

Opinion No.:2005-058

Cockrell, et al

Little Rock Police Department

RE:Is the decision of the custodian of records to release the names, departments, salaries, amounts paid in overtime and total number of overtime hours worked for all city employees during the years 2003 and 2004, in response to a Freedom of Information (FOIA) request from the Arkansas Democrat Gazette consistent with provisions of the FOIA? **RESPONSE:** Yes.



ADOPTED RULES AND REGULATIONS

GAME & FISH COMMISSION

Docket No.: 002.00.05--001
Effective Date: 2/16/05
Contact Person: James Goodhart
Telephone: (501) 223-6327

Emergency Rule: Proclamations for Closure of Deer Seasons

Docket No.: 002.00.05--002
Effective Date: 2/26/05
Contact Person: James Goodhart
Telephone: (501) 223-6327

2005 Waterfowl Hunting Seasons - Snow, Blue and Ross' Goose Conservation Order; Game Tags added to Licenses

HEALTH DEPARTMENT

Pharmacy Services

Docket No.: 007.07.04--001
Effective Date: 3/5/05
Contact Person: C. C. Frazier, Jr.
Telephone: (501) 661-2325

2005 List of Controlled Substances

HUMAN SERVICES

Administrative Services

Docket No.: 016.14.05--002
Effective Date: 5/10/05
Contact Person: Joe Franklin
Telephone: (501) 682-9631

DHS 5001 - Information Systems Security Access

Docket No.: 016.14.05--003
Effective Date: 5/10/05
Contact Person: Joe Franklin
Telephone: (501) 682-9631

DHS 5002 - Information Systems Password Requirements

Docket No.: 016.14.05--004
Effective Date: 5/10/05
Contact Person: Joe Franklin
Telephone: (501) 682-9631

DHS 5003 - Remote Access Policy

County Operation

Docket No.: 016.20.05--002
Effective Date: 2/28/05
Contact Person: Linda Greer
Telephone: (501) 682-8257

Emergency Rule: FSC 05-02 - Food Stamp Program - Exclusion of Combat Pay

HIGHER EDUCATION

Academic Affairs

Docket No.: 008.09.05--001
Effective Date: 3/6/05
Contact Person: Jeanne Jones
Telephone: (501) 371-2012

ADOPTED RULES AND REGULATIONS

**Rules of the Institutional Certification
Advisory Committee**

**POLLUTION CONTROL &
ECOLOGY**

Hazardous Waste

Docket No.: 014.09.04--002
Effective Date: 3/21/05
Contact Person: Mike Bates
Telephone: (501) 682-0831

**Regulation 23 - Hazardous Waste
Management**

**WATER WELL CONSTRUCTION
COMMISSION**

Docket No.: 096.00.05--001
Effective Date: 2/28/05
Contact Person: Crystal Phelps
Telephone: (501) 682-3905

**Rules Governing the Direct Exchange
Wells Subcategory of Geothermal Wells**

INSURANCE DEPARTMENT

***** No Insurance Orders were filed with the *Arkansas Register* during the past filing period for publication in this edition.**

ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency

Period Covered

***** No Legislative Audit Notices were filed with the *Arkansas Register* during the past filing period for publication in this edition.**

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